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**IN THE
COURT OF APPEALS OF INDIANA**

TRACY DENNY,

Appellant-Defendant,

vs.

DONALD MEADE and BARBARA MEADE,

Appellees-Plaintiffs.

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No. 33A01-0611-CV-522

APPEAL FROM THE HENRY SUPERIOR COURT
The Honorable Barbara A. Harcourt, Special Judge
Cause No. 33D01-0604-CT-97

OCTOBER 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Tracy Denny appeals the trial court's judgment in favor of Plaintiffs-Appellees Donald and Barbara Meade. We reverse and remand with instructions.

ISSUE

Denny raises one issue for our review, which we restate as: Whether the trial court abused its discretion in the manner in which it characterized the injury and computed the damages resulting from the collapse of Denny's building upon the Meades' property.

FACTS AND PROCEDURAL HISTORY

Denny owned a building adjacent to the Meades' flower shop in Spiceland, Indiana. The building was in a condition of severe disrepair, and on or about March 25 or March 26, 2006, a portion of the building collapsed and fell upon the Meades' real estate and flower shop. Immediately after the collapse, local authorities closed off the street to the Meades' flower shop, and the Meades were no longer able to conduct business from their property.

The immediate injury to the Meades' flower shop included broken windows and cracks in the block and ceiling. In addition to this immediate injury, was the potential collapse of the remainder of Denny's building. The building, which was taller than and leaning toward the Meades' flower shop, prevented them from operating their business or renting or repairing their building. Indeed, Barbara Meades testified that the impending

collapse of Denny's building prevented the Meades from even procuring an estimate of the cost of repair.

When Denny did not immediately repair or raze her building, the Meades filed suit. At trial, Barbara Meade testified that she had health problems that necessitated the sale of the real estate and flower shop, and that five days prior to the collapse of Denny's building, the real estate, flower shop, and good will had been listed at a price of \$98,000. A real estate agent testified that prior to the collapse of Denny's building, the flower shop and real estate, minus good will, were worth \$90,000. Noting that Denny's building had not been repaired, the Meades (1) characterized the injury to their property as permanent; (2) testified that their property was rendered worthless because of the ongoing potential of further collapse of Denny's building; (3) asked for damages in the amount of \$90,000 for the continuing injury to the real estate and building, plus an additional amount to cover loss of personal property; and (4) offered the deed to Denny so that she could sell it for "salvage value."

After hearing the evidence, the trial court ordered Denny to pay damages in the amount of \$90,000. The trial court ordered the Meades to transfer title to their real estate and flower shop to Denny upon payment of that amount. Denny now appeals.

DISCUSSION AND DECISION

Denny contends that the trial court abused its discretion in its characterization of the injuries and computation of the damages that arose from the collapse of her building. Denny emphasizes that the injury to the Meades' property was not permanent. She further emphasizes that even if the trial court did not abuse its discretion in characterizing

the injury as permanent, it abused its discretion in determining the amount of the damages. Denny asks that we reverse and remand for a hearing on damages.

The computation of damages is a matter within the sound discretion of the trial court. *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 949 (Ind. Ct. App. 2006). A damage award will not be reversed upon appeal unless it is based on insufficient evidence or is contrary to law. *Id.* In determining whether the award is within the scope of the evidence, we may not reweigh the evidence or judge the credibility of witnesses. *Id.* No degree of mathematical certainty is required in awarding damages as long as the amount awarded is supported by evidence in the record; however, an award may not be based upon mere conjecture, speculation or guesswork. *Harlan Bakeries, Inc. v. Muncy*, 835 N.E.2d 1018, 1034 (Ind. Ct. App. 2005).

Where injury to the property is permanent, the appropriate measure of damages is the difference between the fair market value of the property prior to and after the injury. *Id.* As a general rule, permanent injury occurs when the cost of restoration of the property to its pre-injury condition exceeds the market value of the real estate prior to injury. *Neal v. Bullock*, 538 N.E.2d 308, 309 (Ind. Ct. App. 1989). A temporary injury is one which is not defined as permanent. *Id.* In cases where the injury is temporary or repairable, the measure of damages is the cost of repair. *Warrick County v. Waste Management of Evansville*, 732 N.E.2d 1255, 1258 (Ind. Ct. App. 2000).

In the present case, the Meades characterized the injury as permanent because of the impending collapse of the remainder of Denny's building. In making this characterization, the Meades emphasized the difficulty in ascertaining the cost of repair

because the impending collapse impeded experts from observing the actual injuries to the flower shop. The Meades reasoned that because the impending collapse of Denny's building prevented use of the flower shop by the Meades, buyers, or renters, the injury was permanent and total. The trial court's judgment indicates that it agreed with the Meades' characterization and that it found the Meades' evidence to be sufficient to warrant the conclusion that the land was worthless.

It is apparent, however, that the injury to the Meades' real estate and flower shop is not permanent, but instead is ongoing and repairable. It is further apparent that the "worthless" nature of the Meades' property is not permanent; it ends with the collapse, repair, or razing of Denny's building. The Meades' recognition of the lack of permanency is illustrated by their offer to deed the property to Denny so that she can "salvage" it. If the property is permanently worthless, there is no "salvage" value. Accordingly, we must conclude that the trial court abused its discretion in characterizing the injury as permanent and in crafting a damage award that, in essence, forces Denny to buy the Meades' property.

CONCLUSION

We reverse and remand with instructions that the trial court grant Denny's request for a new hearing on damages. In this new hearing, the parties may present evidence of loss of use, restoration, and any other damages occasioned by the continuing nature of Denny's nuisance.

Reversed and remanded.

KIRSCH, J., and DARDEN, J., concur.